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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 245

THE TODD COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The order of the court below (R. 24) granting the motion of the National Labor Relations Board to adjudge petitioner in civil contempt for failure to comply with a decree of the court enforcing an order of the Board is not reported.

The opinion of the court below, granting enforcement of the Board's order in the unfair labor practice proceeding which culminated in the contempt order, is reported at 173 F. 2d 705.[1] The

[1] For the convenience of the Court we have requested the Clerk of the Court of Appeals for the Second Circuit to certify to this Court the printed record in the original unfair labor practice proceeding. References to the record in that proceeding will be designated "R. I."

findings of fact, conclusions of law, and order of the Board (R. I, 1–55) enforced by the court's decree in the unfair labor practice proceeding are reported at 71 NLRB 192.

JURISDICTION

The order of the court below holding petitioner in civil contempt was issued on June 27, 1950 (R. 24). The petition for a writ of certiorari was filed on August 11, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and under Section 10 (e) and (f) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Whether, when the pleadings disclose that petitioner disobeyed the court's decree, and no valid justification for such disobedience is offered, the court may properly adjudge petitioner in civil contempt on the basis of the pleadings.[2]

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[2] Petitioner's question numbered "(1)" (Pet. 4–5), which suggests impropriety in the failure of the court below to make detailed findings concerning "the acts or omissions which the court adjudged constitute bad faith," rests upon the erroneous assumption that petitioner's good or bad faith in conducting negotiations with the Union was in issue in the civil contempt proceeding. The sole issue in that proceeding was whether petitioner's conceded refusal to recognize the Union as exclusive bargaining representative until a new election had been held violated the provision of the decree which required petitioner to recognize and bargain with the Union. Since only a question of law was presented, the propriety of the action of the court below in deciding that question on the pleadings is not subject to challenge.

2. Whether, when the court has enforced a Board order requiring an employer to bargain with a union, despite the union's loss of majority, the employer is justified in disobeying the decree by the fact that after issuance thereof the employees reasserted the union's loss of majority.

STATUTE INVOLVED

The pertinent provisions of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C. Supp. III, 141, *et seq.*) are set forth in the Appendix, *infra,* pp. 20–23.

STATEMENT

Although petitioner[3] does not seek review of the unfair labor practice proceedings before the Board and the court below which culminated in entry of the decree for disobedience of which petitioner was adjudged by the court below in civil contempt, consideration of the question raised by the petition requires reference to those proceedings.

In accordance with Section 10 of the National Labor Relations Act, the Board, on October 4, 1946, issued its decision and order in the unfair labor practice proceeding (R. I. 1–55). Insofar as is here pertinent, the Board found as follows:

Pursuant to a consent election agreement

[3] Petitioner is a New York corporation with its principal office and plant at Rochester, New York, where it is engaged in the printing of safety checks and related items for banks and other business concerns (R. I. 16).

between petitioner and the Union,[4] the Union was designated, on February 14, 1944, by the majority of petitioner's employees in an appropriate bargaining unit,[5] as their exclusive bargaining representative (R. I. 17–18).

On February 21, 1944, the Union requested petitioner to bargain with it on behalf of the employees in the appropriate unit (R. I. 21). Numerous conferences between representatives of the Union and petitioner were held thereafter until sometime in December 1944, when negotiations ceased (R. I. 21–28). Negotiations were not resumed until after issuance of the decree of enforcement by the court below on April 19, 1949 (R. I. 8, 20).

During the entire course of negotiations between February and December 1944, petitioner maintained the position that, whatever agreement might be reached between the parties as to wages, hours, and conditions of employment, it was petitioner's established policy not to sign agreements with labor organizations and repeatedly informed the Union's representatives

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[4] International Printing Pressmen and Assistants Union of North America, Local 38, A. F. L. (R. I. 16).

[5] The unit found appropriate by the Board consisted of all the mechanical employees in the letter press department in the printing division of petitioner's Rochester, New York plant, exclusive of compositors, bindery employees, maintenance employees, supervisory, office and clerical employees (R. I. 17–18).

that petitioner would "never sign a contract with any union" (R. I. 21–28).

Also during the negotiations, in response to the Union's insistence upon a signed agreement, petitioner told Union representatives that petitioner had "spent $100,000 in 1937 to break the Lithographer's strike" and was "willing to do it again" (R. I. 21–22), that if the Union did not agree to petitioner's proposals, including the proposal that there be no signed agreement, petitioner could close the department in which the union members worked, or transfer the work to other plants (R. I. 26), and that even though petitioner's wartime priorities would probably be terminated if it failed to follow a directive of the War Labor Board awarding a signed contract to the Union, petitioner's president would not "care" because it was his "principle not to sign a contract" (*ibid.*).

Upon these facts the Board concluded that petitioner had refused to bargain with the Union, in violation of Section 8 (5) of the Act (R. I. 2–5), and had interfered with, restrained, and coerced its employees, in violation of Section 8 (1) of the Act, by threatening that, rather than sign a contract with the Union, it would use its financial resources to break the Union, and would shut down the department which the Union represented or transfer its work to other plants (R. I. 46).

Accordingly, the Board, on October 4, 1946, issued an order (R. I. 5–7) requiring petitioner to cease and desist from the unfair labor practices found and, upon request, to bargain collectively with the Union as the exclusive representative of its employees and, if an understanding were reached, to embody such understanding in a signed agreement.

About three months after issuance of the Board's decision and order, on January 7, 1947, 31 of petitioner's 41 employees in the appropriate bargaining unit filed with the Board a petition for leave to intervene (R. 32). The petition, which alleged that the employees did not desire to have the Union represent them, requested that the Board dismiss the unfair labor practice proceeding against the Todd Company, and terminate the authority of the Union, or of Elmer Bassett, its agent, to represent the employees, or in the alternative, conduct a new investigation and certification of representatives (*ibid.*).

On January 28, 1947, the Board, noting that its outstanding order of October 4, 1946, directing petitioner to bargain collectively with the Union, had not been complied with, denied the employees' petition (R. 32).

Thereafter the Board filed with the court below a petition for enforcement of its order, and the court below, on March 30, 1949, issued its opinion (R. 1; 173 F. 2d 705), sustaining the Board's findings of fact and conclusions of law, affirming

the Board's action in denying the employees' petition to intervene, and approving the Board's order. Thereafter, on April 19, 1949, the court below issued its decree (R. 1–2, 25) enforcing the Board's order in full.

Thereafter, on or about June 5, 1950, the Board filed with the court below a petition for an order requiring the Todd Company to show cause why it should not be adjudged in civil contempt by reason of its disobedience of the court's decree (R. 1–7).[6]

In support of its petition the Board alleged, insofar as is here material, upon information and belief, supported by appropriate affidavits and exhibits, as follows (R. 1–24):

On or about April 22, 1949, the Union and petitioner entered into bargaining negotiations pursuant to the decree of the court below (R. 3, 8) but at the outset of such negotiations, and thereafter in subsequent negotiations, petitioner asserted that it would not consummate any agreement with the Union unless the Union first established its majority at an election to be conducted by the Board (R. 3, 8–16). On or about November 9, 1949, although the parties had reached agreement on all disputed provisions of a proposed contract, petitioner insisted that before it would execute the agreement the Union's ma-

[6] The Board's petition also sought to have petitioner adjudged in criminal contempt (R. 4–7). However, the court below denied the petition in this respect (R. 24).

jority status must be determined at a Board election (R. 3, 10–11). On or about November 16, 1949, at a conference between representatives of petitioner, the Union, and the Board, petitioner stated that it was unwilling to enter into a contract, the effective date of which would extend beyond March 30, 1950, which was one year after the date of the decision of the court below granting enforcement of the Board's order and, according to petitioner, marked the end of its obligation to bargain with the Union (R. 3, 11–16). At the same time petitioner asserted that it would not enter into a contract, even for such limited period, unless the Union demonstrated in a Board election that it still represented the majority of the employees in question (R. 3–4, 11–12, 14–15).

Thereafter, on or about January 10, 1950, a petition for decertification of the Union was filed with the Board's Regional Office, supported by affidavits signed by petitioner's employees (R. 4, 12, 17). On or about January 26, 1950, the Board's Regional Director dismissed the petition for decertification on the ground that the Board's order, enforced by the decree of the court below, requiring petitioner to bargain with the Union, had not been complied with (R. 4, 12, 17). On or about February 21, 1950, the Board, having considered the decertification petition together

with a statement setting forth the position of the Company, sustained the Regional Director's dismissal on the ground that even assuming that the Union no longer represented the employees, no proceeding to determine representatives can be initiated while there is outstanding an unobeyed Board order directing the employer to bargain with the Union (R. 4, 17). On May 19, 1950, the Board denied a motion for reconsideration of its action and on May 24, 1950, so informed petitioner (R. 4, 24).

Upon the above allegations the Board requested the court below to issue an order to show cause requiring petitioner to answer the allegations of the Board's petition and to show cause why it should not be adjudged in civil contempt for having disobeyed, and continuing to resist and disobey, the decree of the court below entered on April 19, 1949 (R. 5). The Board requested further that upon the return of the order to show cause the court below adjudge petitioner in civil contempt and order petitioner to purge itself thereof by fully complying with the court's decree, posting notices of compliance, and paying costs (R. 5–6).

Under date of June 16, 1950, petitioner filed with the court below its answer to the Board's petition (R. 25–39). After admitting certain allegations contained in the petition and denying

others,[7] the answer admitted (R. 25), as alleged in paragraph V of the Board's petition (R. 3), that during the course of negotiations had with the Union on and after April 22, 1949, following issuance of the decree of the court below, peti-

[7] Petitioner admitted the allegations contained in the following paragraphs of the Board's petition (R. 25–26):

Paragraph I—statement of the bargaining requirement of the Board's order (R. 1–2); II—that petitioner had knowledge of the Board's order and the enforcement decree of the court below (R. 2); VIII—that a petition for decertification of the Union was filed by employees of petitioner on or about January 10, 1950, that said petition was dismissed by the Board's regional director on or about January 26, 1950, and that an appeal was taken to the Board (R. 4); IX—that on or about February 21, 1950, the Board, having considered the petition together with a statement of the Company, sustained the Regional Director's dismissal on the ground that even assuming that the Union no longer represented the employees, no proceeding to determine representatives can be initiated while there is outstanding, and uncomplied with, a Board order directing petitioner to bargain with the Union, and that the Board, on May 19, 1950, denied a motion for reconsideration of its action and, on May 24, 1950, so informed petitioner (R. 4).

Petitioner denied the allegations contained in the following paragraphs of the Board's petition:

Paragraph III—that in its decision upon which its decree was issued the court below expressly rejected petitioner's contention that it was not obligated to bargain with the Union because a majority of the employees in the appropriate unit had, subsequent to issuance of the Board's order, filed a petition with the Board requesting, *inter alia*, decertification of the Union (R. 2–3); IV—that ever since entry of the decree of the court below petitioner has refused and failed, and continues to refuse and fail, to bargain collectively with the Union as exclusive representative of its employees in the appropriate unit (R. 3); VI—that on or about November 9, 1949, the Union and petitioner reached

tioner "stated to the Union that it would not sign a contract with the Union unconditionally recognizing the Union as the sole collective bargaining agency for said employees [in the unit found appropriate by the Board] unless and until an election had been held and a majority of said employees had designated the Union for such representation purposes" (R. 25).

Petitioner's answer admitted further (R. 25–26), as alleged in paragraph VII of the Board's petition (R. 3–4), that at the November 16, 1949, conference between representatives of petitioner, the Union, and the Board, petitioner stated that if it should ultimately be determined that the employees were not entitled to a decertification election petitioner still did not propose to bind the employees to representation which they had stated they did not desire, for a period any longer than was necessary to enable the employees to have their wishes determined by an election, which petitioner allegedly understood from statements made by Board agents to be April 1950.

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agreement on all disputed provisions of a proposed contract, but that petitioner continued to insist that before it would execute the agreement the Union's majority status be determined at a Board election (R. 3); X—that, despite its knowledge of the Board's dismissal of the petition for decertification, petitioner persists in its refusal to bargain and refuses to comply with the decree of the court below (R. 4); XI—that by its acts and conduct described in the Board's petition to adjudge in contempt petitioner has been and continues to be in civil contempt of the court below (R. 4).

Thereafter, pursuant to oral argument and the submission of memoranda by the parties on the question whether petitioner's refusal to recognize the Union constituted a violation of the decree, the court below, on June 27, 1950, entered its order of contempt as follows (R. 24):

> Motion to Adjudge in Civil Contempt Granted with Penalty of $1,000. With Leave to Move to Impose an Additional Penalty Per Day in the Event That Our Enforcement Order Is Not Complied With Within Ten Days After June 27, 1950 the Date of This Order. Motion to Adjudge in Criminal Contempt Denied.

On July 5, 1950, pursuant to a motion by petitioner (R. 39–41), the court below entered an order staying execution and enforcement of its order of contempt until petitioner applied to this Court for a stay, provided such application be made on or before July 25, 1950 (R. 42). On July 6, 1950, petitioner applied to Mr. Justice Jackson for a stay which was granted on July 10, 1950, providing that petitioner file a petition for certiorari on or before August 15, 1950.

ARGUMENT

1. Since petitioner admitted, in answer to the Board's motion to adjudge it in civil contempt, that it refused to grant unqualified recognition to the Union, the sole question before the court was

whether the excuse advanced by petitioner for its refusal constituted legal justification.[8]

As petitioner concedes in its petition (Pet. 14), it "here seeks a review of the decision that its conduct has been contemptuous in taking the position in negotiations with the Union that if a contract is to be signed, including exclusive recognition, recognition of the Union shall be conditioned upon the Union's demonstrating in a proper election that it is entitled to such recognition." The Board did not dispute the fact alleged by petitioner as justification that, after issuance of the decree, the employees reasserted their desire not to be represented by the Union. The Board argued, however, that as a matter of law this fact did not exculpate petitioner.

The facts concerning petitioner's refusal to recognize the Union and its asserted defense being undisputed, no further facts were necessary to enable the court to pass upon the question whether

[8] That a refusal to grant unconditional recognition to the majority representative, absent a valid excuse, is an unfair labor practice is not open to dispute. *May Department Stores Co.* v. *National Labor Relations Board*, 326 U. S. 376, 383–384; *Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U. S. 678, 683–684; *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 358; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 267.

petitioner's refusal to recognize the Union was in violation of the decree. It was thus immaterial whether other allegations of the Board's petition were denied by petitioner; a hearing to resolve such factual issues was unnecessary. Indeed, "a hearing on the issues presented would be a useless undertaking". *Reliance Manufacturing Co.* v. *National Labor Relations Board,* 143 F. 2d 761, 762–763 (C. A. 7); *National Labor Relations Board* v. *Tupelo Garment Co.,* 122 F. 2d 603, 605 (C. A. 5); *National Labor Relations Board* v. *Whittier Mills Co.,* 123 F. 2d 725, 727, 728 (C. A. 5); cf. *Fay* v. *Douds,* 172 F. 2d 720, 724–725 (C. A. 2).

The three contempt cases cited by petitioner (Pet. 10) are not to the contrary. Those cases, unlike the instant case, did not involve uncomplicated admitted facts which established the ultimate fact of disobedience of the court's decree. Moreover, the language of the *Whittier Mills* opinion, *supra* (Pet. 10), clearly supports the position of the Board here, rather than that of petitioner. *Virginian Railway Company* v. *United States,* 272 U. S. 658, 675, is not in point. It was not a contempt case but dealt merely with the general proposition that where, unlike the instant case, the basis of a court's order is not self-evident to the parties, the order should be accompanied by an opinion.

2. Petitioner does not challenge the validity of the decree of the court below enforcing the

Board's order,[9] and indeed is barred from doing so collaterally in the instant proceeding. *McComb* v. *Jacksonville Paper Co.*, 336 U. S. 187, 191–193; *Maggio* v. *Zeitz*, 333 U. S. 56, 68–69; *United States* v. *United Mine Workers*, 330 U. S. 258, 303; *Oriel* v. *Russell*, 278 U. S. 358, 363. Cf. *United States* v. *Mulcahy*, 169 F. 2d 94, 96 (C. A. 2), certiorari denied, 337 U. S. 956.

Petitioner's contention (Pet. 12–16) that it was justified in refusing to grant the Union exclusive and unqualified recognition, or, in other words, in refusing to bargain with the Union as required by the decree, because after issuance of the decree a majority of the employees in the appropriate unit reaffirmed their earlier determination that they no longer wanted the Union to represent them, is refuted by controlling decisions of this Court and presents no question requiring further review.

The law is settled that a union's loss of majority support among the employees in an appropriate bargaining unit, which occurs subsequent to the entry of a Board order requiring the employer to bargain with the union, and while the initial unlawful refusal to bargain upon which the order is based remains unremedied, does not affect the validity of the order or the propriety of its enforcement. *Franks Brothers Co.* v. *National Labor Relations Board*, 321 U. S. 702, 705; *Medo Photo*

[9] Petitioner did not file a petition for certiorari in the unfair labor practice case, in which the decree of the court below was issued on April 19, 1949 (R. 1–2).

Supply Corp. v. *National Labor Relations Board,* 321 U. S. 678, 687; *National Labor Relations Board* v. *Bradford Dyeing Association,* 310 U. S. 318, 340; *National Labor Relations Board* v. *P. Lorillard Company,* 314 U. S. 512; *National Labor Relations Board* v. *Mexia Textile Mills,* 339 U. S. 563, 568.[10]

It is equally clear that the fact that the employees may have manifested their repudiation of the union, as in the instant case, by filing with the Board a petition for decertification of the union under Section 9 (c) (1) (A) (ii), while the Board's order remains uncomplied with, does not affect the rule as to loss of majority established by the cited decisions of this Court, *supra.* See Brief for the Board in Opposition to Petition for Certiorari in *Tower Hosiery Mills, Inc.* v. *National Labor Relations Board,* No. 60, this Term (pp. 17–20), for discussion of this point.

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[10] Petitioner's contention that the principle in question should apply only where the unfair labor practices preceding the union's loss of majority are "of a drastic and overt nature" (Pet. 13) finds no support in the decisions cited or in the controlling decisions of this Court, *supra.* In any event, petitioner's assertion that in "this case there were no overt acts of intimidation or coercion" (Pet. 13, 16) is incorrect. The Board specifically found (*supra,* p. 5) that petitioner, in violation of Section 8 (1) of the Act, had threatened its employees that, rather than sign a contract with the Union, it would use its financial resources to break the Union and would shut down the department which the Union represented or transfer its work to other plants.

There is no claim that the representative status of the Union has been affected by events which occurred for the first time after issuance of the decree of the court below. Petitioner's only contention on this score is that the employees' reassertion of their original defection from the Union justifies petitioner's disobedience of the decree (Pet. 14–16). Petitioner's employees first repudiated the Union as their bargaining representative on January 7, 1947 (R. 32), about three months after issuance of the Board's order and before issuance of the decree below (R. I. 5–7; R. 33). After the court below, on April 19, 1949, issued its decree enforcing the Board's order the employees, on August 30, 1949 (R. 33), and again on January 4, 1950 (R. 35), reasserted their repudiation of the Union and filed decertification petitions with the Board. But clearly the latter circumstance gave petitioner no more warrant for disobeying the decree of the court below than the employees' initial defection gave it for refusing to comply with the Board's bargaining order before enforcement. Indeed it would be anomalous to hold that while an employer may not profit by his illegal acts by asserting a union's loss of majority following his unlawful refusal to bargain, as a defense to enforcement of the Board's bargaining order, he may ultimately achieve the same end by asserting the same loss of majority as a defense to a charge of contempt for refusing to obey the court's decree enforcing the Board's

order. Obviously, if the principle in question is to be effective at all in a fact situation such as that presented here, it must be adhered to at the contempt stage of the case as well as at the enforcement stage.

The determination of the court below to this effect accords with the expressed views of this Court. For petitioner did not appeal from the decree of the court below, but "undertook to make [its] own determination of what the decree meant" and "knew [it] acted at [its] peril" in taking such "calculated risk."[11] *McComb* v. *Jacksville Paper Co.*, 336 U. S. 187, 191–193. To condone petitioner's flouting of the court's unchallenged decree in the manner in which it has, would, as this Court observed in the *McComb* case, *supra,* "give tremendous impetus to the program of experimentation with disobedience of the law which we condemned in *Maggio* v. *Zeitz* * * *"

[11] In an earlier decision in *National Labor Relations Board* v. *Consolidated Machine Tool Corp.*, 167 F. 2d 470, the court below had also held that the Board could properly reject an employees' petition for an election, on the ground that the court's decree enforcing the Board's bargaining order had not been complied with. And in its decision upon the Board's petition for enforcement of its order in the instant case the court below cited this Court's decision in the *Franks Bros.* case, *supra*, in reaffirming the same principle (173 F. 2d, at p. 707).

336 U. S., at p. 192. See the *Maggio* case,[12] 333 U. S. at p. 69, and the cases cited *supra*, p. 15.

CONCLUSION

The decision below is clearly correct and presents neither a conflict of decisions nor any substantial question warranting review. The petition for certiorari should be denied.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

DAVID P. FINDLING,
Associate General Counsel,
MOZART G. RATNER,
Acting Assistant General Counsel,
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National Labor Relations Board.

SEPTEMBER 1950.

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[12] In the instant case there is no question of failure of the Board or the court below to give proper consideration to evidence or contentions of the party found guilty of contempt, such as was present in the *Maggio* case. In that case the court of appeals presumed that the contemnor had in his possession the subject matter of the turnover order there involved, despite evidence and contentions to the contrary. 333 U. S., at pp. 77–78. Here the Board and the court below assumed that petitioner correctly asserted that the Union had lost its majority but held, in accordance with authority, that this fact was immaterial to the question of the validity of the bargaining order and the propriety of its enforcement (R. 4, 24, 25; 173 F. 2d, at p. 707).

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. III, 141, *et seq.*), are as follows:

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a)."

* * * * *

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the em-

ployees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * * * *

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

"(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); * * *"

* * * * *

SEC. 10. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the en-